

Durham Research Online

Deposited in DRO:

16 May 2016

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Attenborough, D. (2016) 'An estoppel-based approach to enforcing corporate environmental responsibilities.', *Journal of environmental law.*, 28 (2). pp. 275-299.

Further information on publisher's website:

<http://dx.doi.org/10.1093/jel/eqw012>

Publisher's copyright statement:

This is a pre-copyedited, author-produced PDF of an article accepted for publication in *Journal of Environmental Law* following peer review. The version of record Attenborough, D. (2016). *An Estoppel-Based Approach to Enforcing Corporate Environmental Responsibilities*. *Journal of Environmental Law* 28(2): 275-299 is available online at: <http://dx.doi.org/10.1093/jel/eqw012>.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

An Estoppel Based Approach to Enforcing Corporate Environmental Responsibilities

Daniel Attenborough*

Abstract – Within the regulatory space that exists at the intersection of UK company law and environmental regulation the business community has generated its own environmental governance initiative to address growing anxiety about companies’ externalised risk. Yet there is currently nothing in law to prevent companies from frequently acting inconsistently with these voluntary unilateral assurances, which has led to widespread concern that environmental values are treated as merely instrumental to the dominant idea of achieving economic benefits for the company. This article examines a specific case for the legal facilitation of binding obligations owed to the environment, which require a company to make good on its previous commitments about environmental responsibility. It seeks to demonstrate that this is possible through the common law doctrine of estoppel, which can be opened up to prevent a company from acting inconsistently with its previous statements or actions about the governance of environmental risk.

A. INTRODUCTION

There is little doubt that directors’ standards of loyalty in UK company law were traditionally owed *to the company itself*.¹ Although there has been much discussion about what is meant by “the company”,² it seems that the courts in general deferred to managerial discretion as to what was best considered to serve a company’s overall interests in any given instance.³ This administrative discretionary authority ensured

* Senior Lecturer in Corporate Law, Durham University. I would like to thank Ciara Hackett, Andrew Keay, William Lucy, Marc Moore, and Sean Thomas for extremely helpful comments and suggestions on earlier versions of this article. I am also grateful to the anonymous JEL referees for their extremely thoughtful and constructive criticisms, which have undoubtedly improved the clarity and rigour of the arguments in this article. The usual disclaimers apply.

¹ See e.g. *Peskin v Anderson* [2000] EWCA Civ 326; *Percival v Wright* [1902] 2 Ch. 421.

² Alan Dignam and John Lowry, *Company Law* (OUP 7th edn, 2012) at 335; Dan Prentice, ‘Creditor’s Interests and Directors’ Duties’ (1990) 10 OJLS 265 at 273.

³ See e.g. Andre Tunc, ‘The Judge and the Businessman’ (1986) 102 LQR 549.

that, contrary to popular belief, the directors and managers of large, public companies had no enforceable duty to maximise shareholder wealth.⁴ The logical inference is that the enduring and influential view of shareholder concerns and values being at the centre of managerial norms and practices was not generated by legal doctrine, but can be better explained through the demands of global financial markets.⁵ Nonetheless, the company law reform project that occurred at the turn of this century has now formally embraced and enshrined in statute a “private” economic understanding of the company, which privileges the exclusive interests of shareholders.⁶ This fits with a recurring theme in UK corporate governance, which is increasingly predicated upon a narrow view of the internal decision-making structures of companies, whereby managers are or should be formally accountable to shareholders alone.⁷ This cumulative legal emphasis is referred to in company law and practice as the so-called shareholder value or shareholder primacy principle.⁸ It typically denotes the corporate managerial standard of generating an optimal financial return from a company’s business for the main benefit of its shareholders, rather than to address other social and public concerns.⁹

This is a compelling account of why the environmental interest has traditionally been given comparatively little formal recognition and certainly no substantive legal powers within the dominant private understanding of company law and corporate

⁴ A narrow thread of case law seemingly equated the company’s interests with the current and future shareholders, but it is more accurate to conclude that English legal doctrine has never unequivocally embraced to shareholder primacy. On this, see e.g. Simon Deakin, ‘The Coming Transformation of Shareholder Value’ (2005) 13 CG 11 at 11.

⁵ Marc Moore and Antoine Rebérioux, ‘Revitalising the institutional roots of Anglo-American corporate governance’ (2011) 40 Econ Soc 84 at 86.

⁶ s 172 of the Companies Act 2006.

⁷ John Armour, Simon Deakin, and Suzanne Konzelmann, ‘Shareholder primacy and the trajectory of UK corporate governance’ (2003) 41 BJIR 531 at 531.

⁸ See n 38 below.

⁹ Colin Mayer, ‘Corporate Governance, Competition and Performance’ (1997) 24 J L & Soc 152 at 155.

governance. It is commonly reasoned, instead, that in those instances where the pursuit of shareholder value produces negative externalities, “corrections” should be made not by reforming the fabric of company law itself but, instead, through alternative “public” environmental regulation.¹⁰ This has been an important reason why regulatory regimes aimed at environmental protection were developed.¹¹ Certainly, when we look inside the rules and structures of UK environmental law, we see very clearly that it is an extensive mixture of more traditional forms of statutory precepts, but also an increasing focus on decentred forms of voluntary regulation and co-operative governance approaches to environmental protection. In addition, environmental law, and the underlying philosophy of the instruments that have been relied upon, is engaged in a symbiotic exchange of ideas and pursuits with company law rule making and corporate culture. This suggests an environmental liability regime that has the potential to re-balance the obligations and powers of companies, but also to influence the way in which these business enterprises define and prioritise their responsibilities. However, it is submitted that, for a number of reasons, environmental law and policy has achieved only limited developments and successes in displacing the dominant idea that corporate boards must and should base their actions on the exclusive interests of shareholders.

While no attempt is made in this article to speak to the more broad and complex problems of the ideologically staid climate in company law or to expand the mandate

¹⁰ Henry Hansmann and Reinier Kraakman, ‘The End of History for Corporate Law’ (2000) 89 Geo LJ 439 at 442; Len Sealy, ‘Directors’ “Wider” Responsibilities – Problems Conceptual, Practical and Procedural’ (1987) 13 Mon LR 164 at 176. This is not to suggest that there does not exist a continuing debate within company law in its attempt to internalise extensive, uncompensated costs on various non-shareholder constituencies. See e.g. John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon 1993) at 261.

¹¹ Elizabeth Fisher, Bettina Lange, and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (OUP 2013) at chapter 2.

of environmental law, an understanding of these legal domains does inform several of the points underlined. In particular, it is important to identify the background state of legal normality against which economic concerns sit uneasily with environmental safeguards. Moreover, an exposition and analysis of these two areas of law foregrounds the regulatory space that has in recent years given rise to the business community generating its own governance initiatives to address growing anxiety about the contribution of commercial actors toward environmental degradation and natural resource depletion. In this regard, most large, modern companies now promulgate voluntary unilateral assurances about environmentally responsible behaviour, which take the form of environmental responsibility policies, sustainability reports, and internal ethics codes.¹² In a practical sense, these self-regulatory products are undertaken by companies to demonstrate a societal commitment to protect the environment in their global operations. On a philosophical level, they purport to mediate the broader, complex relationship between company law and private ordering, and environmental regulation and values. In doing so, they highlight the structural necessity to the environmental relation of managerial norms in favour of balancing privatised gains and externalised risk to the natural world. Yet in spite of clear promise, there is currently nothing in law to prevent companies from acting inconsistently with these voluntary unilateral assurances, which has led to widespread scepticism that environmental concerns or values are treated as merely instrumental to the overall objective of achieving economic benefits for the company.¹³

¹² On this, see e.g. Lisa Fairfax, 'The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms' (2006) 31 J Corp L 675.

¹³ David Millon, 'Two models of corporate social responsibility' (2011) 46 Wake Forest L Rev 523 at 533-535.

The purpose of this article is thus to provide a specific case for the facilitation of an enforceable legal right, in certain situations, to be conferred on the natural world, which will ensure that companies are more accountable for the environmental statements or actions *when no such obligation exists within formal areas of law*. It examines the compelling case for deploying the doctrine of estoppel, which is a legal principle in common law legal systems whereby a person is precluded from asserting something contrary to what is implied by a previous action or statement of that person. The article argues that if a company has produced statements or actions about the governance of environmental risk, and this can be reasonably taken to have induced reliance and expectation, then that company should be “estopped” from defaulting on its commitment. On a more general level, it is hoped that the article will further frame our understanding of what private law can in fact do to fundamentally interact with regulation relating to environmental issues in a way that is currently missing. This could come at no more an urgent time than now, when there is a pressing need for workable and sustainable solutions to environmental inequality in corporate decision-making. It is of course recognised that doubts might exist as to whether the environment itself is readily or plausibly capable of being a rights holder. This point warrants consideration and it will be addressed in some detail later in the article.¹⁴

The rest of the article proceeds as follows. Part B provides an examination of the manner in which economic thinking has influenced the trajectory of UK company law. The sources and contours of this discussion are set out in broad terms, and only to the extent necessary to illustrate the point that the exclusive interests of

¹⁴ See the text accompanying notes 89-101 below.

shareholders are internalised within corporate governance processes to the exclusion of pressing environmental concerns. Part C provides a brief overview and analysis of UK environmental law in order to highlight the conceptual, intellectual, and practical challenges confronting public regulation of commercial actors that externalise environmental risk. Parts D and E seek to examine from a corrective justice perspective how the doctrine of estoppel can be used in certain situations to oblige a company to internalise environmental risk when it has provided voluntary unilateral commitments about environmental sustainability. Part F offers some concluding remarks.

B. THE CONTRACTARIAN INFLUENCE ON UK COMPANY LAW

The courts have frequently asserted that directors are empowered agents of the company, with which they are situated in a fiduciary relationship.¹⁵ It is of course trite that, for over a century, companies have been regarded as having distinct juristic personality.¹⁶ In the fierce controversy over corporate personhood, however, one truism resounds through the literature: a company has ‘no soul to be damned and no body to be kicked.’¹⁷ This has generated problems of accountability of corporate boards in company law and scholarship. The practical response from UK company law and policy, and many other jurisdictions inheriting British law, has been to use

¹⁵ *Re City Fire Equitable Fire Insurance Co* [1925] Ch 407, 426.

¹⁶ *Salomon v A Salomon & Co Ltd* [1897] AC 22. Of course, one should bear in mind that the Lords’ unanimous ruling was simply giving effect to the doctrine of corporate personality as enshrined in section 6 of the Companies Act 1862.

¹⁷ The quote is attributed to Baron Edward Thurlow, an eighteenth-century British lawyer and politician. The quotation was given wide publicity by John Coffee Jr.’s influential article: ‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79 Mich L Rev 386.

the economic logic and language of “agency”¹⁸ to justify the position of shareholders as de facto principal and monitor of the executive office-holders’ discretionary administrative power.¹⁹ Indeed, the law deploys multiple instruments to regulate and contain this managerial agency problem. There are a number of important doctrinal rules that internalise the interests of shareholders within the boards’ managerial calculus.²⁰ Broadly speaking, shareholders have ultimate and revocable constitutional prerogative to draft and amend the articles of association,²¹ and collective ex ante appointment²² and removal rights²³ that they are entitled to exercise over the board of directors. Additionally, directors are now obliged under section 172 of the Companies Act 2006 merely to “have regard to”, amongst other factors, the interests of the environment *while seeking to promote the success of the company for the benefit of its shareholders*.²⁴ Shareholders also have the limited right to remedy managerial misfeasance or malfeasance on an ex post facto basis in court,²⁵ as well as the no frustration prohibition in the UK Takeover Code.²⁶ The story of UK company

¹⁸ The most influential paper in this movement was Michael Jensen and William Meckling, ‘Managerial behaviour, agency costs and ownership structure’ (1976) 3 J Fin Econ 305.

¹⁹ Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (HUP 1991) at 38, 67-68; William Klein, ‘The Modern Business Organization: Bargaining Under Constraints’ (1982) 91 Yale LJ 1521 at 1538-1540.

²⁰ The literature on shareholder primacy is too voluminous to cite in its entirety. Some useful examples include, Jonathan Macey, ‘An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties’ (1991) 21 Stetson L Rev 23; Bernard Black and Reinier Kraakman, ‘A Self-enforcing Model of Corporate Law’ (1996) 109 Harv L Rev 1911; D. Gordon Smith, ‘The Shareholder Primacy Norm’ (1998) 23 J Corp L 277. On two very different interpretations of shareholder primacy, one based around shareholder protection and the other centred on shareholder empowerment, see Lyman Johnson and David Millon, ‘Misreading the Williams Act’ (1989) 87 Mich L Rev 1862 at 1899-1907.

²¹ Sections 21 and 33 of the Companies Act 2006.

²² Art. 20 of Model Articles for Public Companies.

²³ Section 168 of the Companies Act 2006.

²⁴ Following extensive debate about this provision, the academic or practitioner consensus narrative suggests that it encapsulates a shareholder primacy approach, while the (unenforceable) social or public element of the duty is essentially ameliorative. On this, see. e.g. Christopher Bruner, *Corporate Governance in the Common Law World* (CUP 2013) at 32-33; Marc Moore, *Corporate Governance in the Shadow of the State* (Hart, 2013) at 28 and 192-194; Daniel Attenborough, ‘The Neoliberal (Il)legitimacy of the Duty of Loyalty’ (2014) 65(4) NILQ 405 esp. at 418-427.

²⁵ ss260-264 of the Companies Act 2006.

²⁶ General Principle 3 and Rule 21 of the UK’s Takeover Code prevent the types of unilateral action that a listed company’s board of directors may take when subject to an actual or imminent unsolicited

law in the twentieth century and early twenty-first century is thus one of a narrow depiction of the internal decision-making structures of business organisations, whereby corporate officers and managers are in the ordinary course of business formally accountable to shareholders alone.

The main driver of this relatively narrow focus of company law and practice, which we might trace back to the neoliberal revolution of the 1970s,²⁷ has been the aforementioned invocation of neoclassical economic analysis in Anglo-American corporate legal scholarship and policy-making. It was a discipline-shaping theoretical turn that effectively brought law and economics into the path of company and financial markets law. At the heart of this doctrinal and normative analysis is a “contractarian” model of the company, and the rules related thereto,²⁸ which has resonated with the traditional legal virtues of conservatism and classical liberalism. The modern brand of contractarian theory was pioneered over several decades ago by the influential contributions of financial economists and company lawyers.²⁹ In the fewest possible words, the theory frames the fundamental rules and structures of company law and corporate governance in “private” enabling or default terms,³⁰

takeover bid. On this no frustration prohibition see e.g. David Kershaw, ‘The Illusion of Importance: Reconsidering the UK’s Takeover Defence Prohibition’ (2007) 56(2) ICLQ 267.

²⁷ For some useful works on neoliberalism, see Raymond Plant, *The Neoliberal State* (OUP 2010); David Harvey, *A Brief History of Neoliberalism* (OUP 2007); Noam Chomsky, *Profit Over People: Neoliberalism and Global Order* (Seven Stories Press 1998).

²⁸ There are too many works in this genre to cite exhaustively. For an overview, see e.g. Michael Whincop, ‘Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law’ (1999) 19 OJLS 19 at 28; Stephen Bainbridge, ‘Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship’ (1997) 82 Cornell L Rev 856 at 856.

²⁹ See generally, Armen Alchian and Harold Demsetz, ‘Production, Information Costs and Economic Organizations’ (1972) 62 Am Econ Rev 777; Michael Jensen and William Meckling, ‘Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure’ (1976) 3 J Fin Econ 305; Eugene Fama, ‘Agency Problems and the Theory of the Firm’ (1980) 88 J Pol Econ 228; Frank Easterbrook and Daniel Fischel, ‘The Corporate Contract’ (1989) 89 Colum L Rev 1416; and Easterbrook and Fischel, above n 19.

³⁰ On the categorisation of legal rules, see Melvin Eisenberg, ‘The Structure of Corporation Law’ (1989) 89 Colum L Rev 1461.

which implies that company law is essentially a derivative of contract law.³¹ The institutional competence of “legal positivist” ideas of law as mandated by the state or the courts are highly circumscribed due to the purportedly rent seeking, inefficient and restrictive effects on business.³² In place of such regulatory instruments, neoclassical economics, and especially its new institutional branch, idealises the self-regulatory capability of the market to endogenously produce and enforce rules to govern corporate activities.³³ The “market” in this context refers to an efficient process of private bargaining between a collection of autonomous and rational individuals adapting themselves to circumstances, and it is this cooperation and conflict that determines the substantive content of company law rules. When the presence of constitutive legal rules and structures is irrefutable, contractarian theory usually infuses formal law with a ‘passive-instrumental’³⁴ quality, whereby mandatory legal rules are viewed as “standard-form terms” *that would otherwise tend to evolve* were the costs of making adequate provision for all possible contingencies sufficiently low.³⁵

³¹ Easterbrook and Fischel, above n 19 at 166. On the counter-intuitive claim that company law may be trivial, see Bernard Black, ‘Is Corporate Law Trivial? A Political and Economic Analysis’ (1990) 84 NWULR 542; Roberta Romano, ‘Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws’ (1989) 89 Colum L Rev 1599.

³² On the limits of conventional law and regulation, see Dan Awrey, William Blair and David Kershaw, ‘Between Law and Markets: Is There a Role For Culture and Ethics in Financial Regulation?’ (2013) 38 Del J Corp L 191 at 198-205.

³³ The classic accounts of Hayek’s distinction between constructed legal rules and de-centralised law are: Friedrich Hayek, *Law, Legislation and Liberty* (Routledge 1973) esp. at 72-91; Friedrich Hayek, *The Road to Serfdom* (Routledge 1944) esp. at 75-90.

³⁴ Marc Moore, ‘Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism’ (2014) 34(3) OJLS 693 at 700. For a US perspective, see e.g. Robert Thompson, ‘Corporate Law Criteria: Law’s Relation to Private Ordering’ (2005) 2(1) Berkeley Bus L J 97 at 98.

³⁵ Easterbrook and Fischel, above n 29 at 1428. See also, Richard Posner and Andrew Rosenfeld, ‘Impossibility and Related Doctrines in Contract Law: An Economic Analysis’ (1977) 6 J Leg Stud 83.

Based on the logic above, contractarian thinking disaggregates the existence of the company as a distinct legal institution into a market-directed bundle of contracts,³⁶ either express or implied,³⁷ and these notional bargains consist of many different kinds of risks and opportunities that are voluntarily exchanged amongst rational and self-interested actors.³⁸ Accordingly, every corporate actor is said to contribute enterprise-specific inputs (for example, equity, human capital, credit loan, custom) in exchange for receiving material benefits for themselves (such as, dividend, interest, price, wage). This logic has opened the way for a divisive reinvention of the shareholder's primary or exclusive status within company law and corporate governance. From a contractual perspective, non-equity interests are theoretically able to bargain in advance, or re-negotiate along the way, for a specified economic return on their investments, whether in terms of a fixed wage or interest rate, and so on. The shareholder, rather, is viewed as a "residual claimant" that has no fixed return from corporate activity, and thus ranks behind the satisfaction of all rights that other parties have contracted for in advance.³⁹ This lower priority, risk bearing, and costs of monitoring management, in theory at least, mean that shareholders are collectively incentivised to demand *additional* legal protection and/or governance rights within the company to compensate for any downside and to encourage

³⁶ This is based on the view that debates about the personification of the corporate entity are preoccupied with abstract concepts rather than practical or concrete issues. On this, see e.g. William Bratton, 'The New Economic Theory of the Firm: Critical Perspectives from History' (1989) 41 *Stan L Rev* 1471 esp. at 1493.

³⁷ Easterbrook and Fischel, above n 29 at 1428-1429.

³⁸ Daniel Fischel, 'The Corporate Governance Movement' (1982) 35(6) *Vand L Rev* 1259 at 1273. For a general critique of economic rationality and its implications for the analysis of law, see Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press 1997) at 364-381; Wanda Wieggers, 'Economic Analysis of Law and "Private Ordering": A Feminist Critique' (1992) 42 *UTLJ* 170.

³⁹ See Easterbrook and Fischel, above n 29 at 1425, remarking that investors 'bear the risk of failure... and receive the rewards of success.' For criticism of the thesis that shareholders constitute residual claimants, see Lynn Stout, 'Bad and Not-so-Bad Arguments for Shareholder Primacy' (2002) 75 *S Cal L Rev* 1189 at 1193-1195. On complete and incomplete contracting generally, see Simon Deakin and Alan Hughes, 'Economic Efficiency and the Proceduralisation of Company Law' [1999] *CFILR* 169 at 177.

maximum corporate performance.⁴⁰ While other corporate groups are implicitly prepared to concede structural protection and governance rights because of a pre-established harmony between shareholder wealth and the long-term quantitative benefits for the company,⁴¹ the environment is not privy to this notional economic bargaining process. Put simply, the natural world is not afforded any special governance rights or protections within the notional company, and the rules related thereto, not least because of the technical infeasibility of the environment being represented within any doctrinal or normative bargaining framework. It is, instead, viewed as an extra-contractual externality for which environmental regulation, rather than private ordering, represents the only available means of protection.⁴²

It is fair to suggest that the ability of the contractarian approach to provide a complete account of the anatomy of company law is not without its opponents.⁴³ The majority of opinions have expressed disagreement about the doctrinal significance of shareholder value,⁴⁴ while others objected to the normative accent given to economic efficiency.⁴⁵ Yet the fact remains that contractarian theory has been highly influential upon the fundamental and enduring debate as to how we should view the company,⁴⁶ and it has found favour in various significant policy-making discussions that go to the

⁴⁰ Easterbrook and Fischel, above n 19 at 91.

⁴¹ A point made famous by Milton Friedman 'The Social Responsibility of Business is to Increase its Profits' (1970) *The New York Times Magazine*.

⁴² See above n 10.

⁴³ The classic critiques are Paddy Ireland, 'Property and contract in contemporary corporate theory' (2003) 23(3) *LS* 453; William Bratton, 'The "Nexus-of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell L Rev* 407.

⁴⁴ See e.g. Gavin Kelly and John Parkinson, 'The Conceptual Foundations of the Company: A Pluralist Approach' (1998) *CFILR* 174. For a US perspective, see Stout, above n 39.

⁴⁵ See e.g. David Millon, 'Theories of the Corporation' (199) *Duke L J* 201; Lawrence Mitchell, 'The Cult of Efficiency' (1992) 71 *Tex L Rev* 217.

⁴⁶ The origins of this debate can be found in the famous Berle-Dodd dialogue that unfolded during the 1930s in the pages of the *Harvard Law Review*. For a general background, see Joseph Weiner, 'The Berle-Dodd Dialogue on the Concept of the Corporation' (1964) 64(8) *Colum L Rev* 1458.

heart of UK company law and practice.⁴⁷ Moreover, the rules of company law itself comprise many different elements that appear to give credence to a private contractual view of the company. Most notably, the company's articles of association contain primarily internal governance rules providing for its constitutional structure and distribution of power between the board and the shareholder body. The rules set out in the corporate constitution are contractual terms upon which the shareholders agree to become associated with the company.⁴⁸ Perhaps unsurprisingly UK law views the legal status of the constitution in contractual terms,⁴⁹ and this conclusion resonates with a number of judicial pronouncements that 'acknowledge contract as *the* animating force within company law.'⁵⁰ Overall, then, the theoretical model that is generally posited by commentators attempting to understand company law from a private contractual perspective remains hugely significant in providing the discipline's vantage point for understanding and assessing that law.

C. THE LIMITATIONS OF ENVIRONMENTAL LAW AND GOVERNANCE

The previous section illustrated how a highly influential strand of company law theorising, which seeks to conceive of company law in private terms, not only colours the substance and interpretation of the law, but this framework also prioritises the values and concerns of shareholders at board and managerial levels. It will be recalled that asserting the exclusive primacy of shareholders in company law does not

⁴⁷ Law Commission Consultation Paper, *Corporate Directors* (1997 LCCP No.153); Department of Trade and Industry (now the Department for Business, Innovation & Skills), *Modern Company Law for a Competitive Economy: The Strategic Framework* (London: DTI 1999) at para. 2.4.

⁴⁸ s 33 of the Companies Act 2006.

⁴⁹ See e.g. *Hickman v Kent Romney Marsh Sheep-Breeders Association* [1915] 1 Ch 881. On this, see David Kershaw, *Company Law in Context: Text and materials* (OUP 2nd edn. 2012) at 79-87.

⁵⁰ Harry McVea, 'Section 994 of the Companies Act 2006 and the Primacy of Contract' (2012) 75(6) MLR 1123 at 1123. For a representative authority see *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855. On 22 February 2012 the Supreme Court refused permission to appeal the CA's decision.

imply that the extra contractual values or concerns of the environment must or should go unprotected. There is little doubt that virtually every sector of corporate activity across the globe, through capitalism's need to proliferate and profit, is responsible for consuming significant amounts of finite resources and energy, and causing waste accumulation and resource degradation.⁵¹ The typical underlying normative claim from a law and economics perspective suggests that the only available means of protection lies outside company law, specifically within the domain of environmental law and policy.⁵² This has been an important determinant of the development of the UK environmental law framework.⁵³ The purpose of this section is thus to examine and comment on the extent to which domestic environmental law regulates or contains the negative impacts of companies on the environment, particularly at board level, and whether companies are answerable for their decisions, practices, and outcomes in a way that is not presently conceived within the company law framework. It does not offer a complete appraisal of UK environmental legislation, regulation and governance. Rather, this section identifies and evaluates the dominant approach of this body of law, and the underlying philosophy of the instruments that have been relied upon, to achieve environmentally sound conduct of companies. This is done only to the extent necessary to highlight the tensions within and shortcomings of traditional legal doctrine and more recent environmental governance arrangements that seek to regulate corporate enterprises.

Because environmental law tends to operate in multi-jurisdictional frameworks, legal and regulatory initiatives in one jurisdiction are often directly and indirectly related to

⁵¹ See e.g. Elisa Morgera, *Corporate Accountability in International Environmental Law* (OUP 2009) at Chapter 1.

⁵² See above n 10.

⁵³ Fisher, et al, above n 11.

legal approaches in another.⁵⁴ As a matter of fact, the UK environmental regime has been increasingly shaped by the extensive policy of the EU,⁵⁵ which, in turn, is significantly intertwined with other international and national environmental policies.⁵⁶ From its comparatively embryonic origins in the early 1970s,⁵⁷ UK environmental law has come to assert a significant influence on the scope of corporate activities. The dominant approach early on was to introduce innovative public law instruments designed to prohibit or limit environmentally harmful activities of large industries (e.g. pollution to air and water) by using a direct or command and control approach. There have been a number of substantive environmental statutes over the course of this period,⁵⁸ which in general achieved notable reductions of point-source pollution caused by large, homogenous industrial facilities operating within a single jurisdiction.⁵⁹ However, command and control regulation has had many critics. This has mainly emanated from within the field of neo-classical economics,⁶⁰ which, it will be recalled, has also increasingly influenced the path of Anglo-American company law and scholarship. Proponents of this approach suggest that the more complex the environmental problem (such as diffuse source pollution), the more obvious become the limitations, unfairness to business, and the inefficiencies of regulatory interference

⁵⁴ Elizabeth Fisher, Bettina Lange, Eloise Scotford, and Cinnamon Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) JEL 213 at 239.

⁵⁵ See e.g. The EU Environmental Liability Directive (2004/35/EC) of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143/56.

⁵⁶ For two prominent international examples, see 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev.1 (Stockholm Declaration); 'Rio Declaration on Environment and Development' (13 June 1992) UN Doc A/CONF.151/6/Rev.1 (Rio Declaration).

⁵⁷ Although UK environmental administrative arrangements can claim a longer lineage, the 1970s was the first decade of substantial legislative action. This period of regulatory action coincided with the creation of first European environmental policy in 1972.

⁵⁸ Some representative examples include: Environmental Protection Act 1990, Town and Country Planning Act 1990, Water Resources Act 1991, Environmental Act 1995, Pollution Prevention and Control Act 1999, Climate Change Act 2008, Regulatory Enforcement and Sanctions Act 2008.

⁵⁹ Neil Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21(2) JEL 179 at 183-184.

⁶⁰ See e.g. Cass Sunstein, 'The Paradoxes of Regulation' (1990) 67 U Chi L Rev 408.

in addressing it.⁶¹ A large number of perspectives external to the economic analysis of law have also expressed disappointment about the incoherent fragmentation and complexity of much environmental legislation (and its administration).⁶² Others have expressed scepticism about a traditionally light-handed approach to public law enforcement intensity in many Anglo Saxon jurisdictions.⁶³

Due to these powerful political and economic priorities, the majority of which were driven by a considerable turn towards neoliberalism,⁶⁴ UK environmental law during the late-1980s and onwards underwent substantial legal and regulatory transformation. This saw a reorientation away from first generation public environmental law to a diversification of flexible and cost-effective soft and hard law governance arrangements. In the neoliberal spirit of de-regulation and the sanctity of the market, meanwhile, government regulators have faced cutbacks to their power and budgets. One principal line of reinvention has been a ‘reprivatisation’⁶⁵ of significant aspects of environmental law, by installing new legal rules and structures to allow and encourage companies’ voluntary self-regulation, collaborative governance, and the use of quasi-legal third parties (such as the Environment Agency, NGOs, local government and EU authorities, Secretaries of State), as substitute regulators that assess the performance of private enterprises.⁶⁶ This market-based or networked form of governance, which supplements more traditional forms of public legal control, is

⁶¹ Gunningham, above n 59 at 183-184.

⁶² Eloise Scotford and Jonathan Robinson, ‘UK Environmental Legislation and Its Administration in 2013 – Achievements, Challenges and Prospects’ (2013) 25(3) JEL 383 at 388-392.

⁶³ Fisher, et al, above n 11 at chapter 3; Keith Hawkins, *Environment and Enforcement* (OUP 1984) esp. at XIV. On the importance of enforcement intensity of the law, see John C. Coffee, Jr., ‘Law and the Market: The Impact of Enforcement’ (1997) 156 U Pa L Rev 229 at 233.

⁶⁴ See above n 27.

⁶⁵ Sanford Gaines and Cliona Kimber, ‘Redirecting Self-Regulation’ (2001) 13(2) JEL 157 at 157.

⁶⁶ On this new governance form of regulation, see e.g. Gunningham, above n 59 at 184 et seq. For a much broader perspective, see Sol Picciotto, ‘Constitutionalizing Multilevel Governance?’ (2008) 6(3) ICON 457.

regarded as a practical approach based upon the overarching theory of ‘reflexive law’.⁶⁷ At its heart, reflexive law seeks to mobilise ‘the self-referential capacities of social systems and institutions outside the legal system’⁶⁸ to formulate individual companies’ response to complex social problems such as environmental protection. There are powerful economic arguments for the application of reflexive law strategies to environmental regulation, which fit with political theories rooted in autonomy and the promotion of individual freedom of choice – and importantly avoid the imposition of binding standards altogether. The main practical applications of this approach in Europe, namely ecological auditing,⁶⁹ voluntary environmental agreements,⁷⁰ and emissions trading systems,⁷¹ are purported to connect environmental values and processes to UK boardroom culture, but also empower communities and enable markets to make informed judgments about corporate environmental performance.

It is without doubt that the modern UK environmental framework is now a vast and complex mixture of established statutory precepts, *sui generis* reforms, non-legal regulatory techniques, and policy and legal norms from a range of different jurisdictions. Inevitably, all initiatives have strengths and weaknesses, and none is likely to be entirely effective in constraining complex environmental problems. Nonetheless, on the basis of preliminary evidence the UK regulatory strategy has in

⁶⁷ The pioneering article is Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law Soc Rev* 239.

⁶⁸ Eric Orts, ‘Reflexive Environmental Law’ (1995) 89 *NWULR* 1227 at 1232

⁶⁹ The European Commission formally produced a Regulation on Eco-Management and Audit Scheme (EMAS). See Council Regulation 1836/93, 1993 OJ L, 168/1, 29.6.93. Regulations are directly binding in the Member States without the need for any implementing legislation.

⁷⁰ The European Commission formally adopted a Recommendation on Environmental Agreements to provide some guidance to Member States incorporating such agreements into their environmental policy. See Recommendation 96/733/EC, 1996 OJ L 333/59.

⁷¹ The European Commission formally adopted a Directive on the EU Emissions Trading System (EU ETS). See Directive 2003/87/EC of the European Parliament and the Council establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC.

general achieved only marginal achievements in halting, or at least slowing, corporate divesting of environmental risk. It is submitted that this is because of the increasingly heavy reliance on a diverse combination of regulatory and governance mechanisms, and in particular the political choice for their use, which suggests a *co-operative* overall goal with corporate activity and rule making. But as it is currently formulated this collaborative reform project works only at the abstract level in which there is some form of parity in the simultaneous exchanges between environmental regulation and company law. In practice, environmental law, as a discipline, is generally regarded as ‘a conceptual hybrid, straddling many fault lines, and presumed to have no philosophical underpinnings’.⁷² It is this incoherence and relative ‘immaturity’⁷³ that acts as an impediment to facilitating improved corporate decisions, practices, and outcomes within the economically-oriented and philosophically settled normative order of company law and corporate governance. Similarly, proponents of reflexive law tend to overlook the difficulty a company might face in constructing a more socially acceptable frame of reference to internalise environmental values, which is necessarily external (because the natural environment is external) to a company’s more familiar conception of its private function in society.⁷⁴ The broader point is that the shifts over the previous five decades from law, to decentred regulation (especially light handed regulation) and now, towards environmental governance have produced a co-opted form of rule making for some parts of the UK corporate landscape in which it is more like ‘asking the inmates to design, build and run the asylum.’⁷⁵

⁷² Fisher, et al, above n 54 at 219.

⁷³ Ibid at 218.

⁷⁴ Gaines and Kimber, above n 65 at 169.

⁷⁵ This phrase is taken in a distinct, but comparable, context, and can be found in: Alan Dignam, ‘Exporting corporate governance: UK regulatory systems in a global economy’ (2000) 21(3) Comp Law 70 at 74.

D. RE-DEPLOYING CORPORATE ENVIRONMENTAL LANGUAGE

It has quickly become clear that what shareholders own are shares in the company, which is a type of contract between the shareholder and the corporate entity that gives shareholders certain legal rights. The dominant private conception of companies, and the law which regulates them and their operations, recognises an exclusive beneficial legal status of these rights. Within this frame of reference, issues of protecting the commons and the public interest do not stand on an equal footing with the company's shareholders; dealing with environmental problems is typically viewed as the preserve of environmental regulatory regimes. There is little doubt that the conceptual and doctrinal relationship between environmental law, environmental problems, and company law is nuanced and multifarious. Yet because of the ideological and practical tensions, and the additional weighting attached to economic concerns at the European and UK levels, environmental law in general operates at the margins of company law with its characteristic focus on private rights and relationships. This unsatisfactory legal situation has created a regulatory space, against which business enterprises have in recent years endogenously produced environmental citizenship initiatives to address growing anxiety about the contribution of commercial actors toward environmental degradation and natural resource depletion.⁷⁶ On a philosophical level, these self-regulatory governance arrangements purport to mediate the broader, complex relationship between company law and private ordering, and environmental regulation and values. In doing so, they highlight the structural necessity to the environmental relation of managerial norms in favour of balancing privatised gains and externalised risk to the natural world. However, it will be

⁷⁶ On this, see e.g. Fairfax, above n 12.

expounded upon below that such endogenous corporate environmental responsibility initiatives are not without their difficulties. If we recognise that the law must grow and develop in response to (indeed in anticipation of) evolving concepts and needs of modern society, then it becomes necessary to think about new modes of liabilities and responsibilities to help fill this regulatory space.

Many companies based in the UK and elsewhere now formulate voluntary unilateral assurances about environmental standards⁷⁷ to meet societal expectations about the obligations and liabilities of commercial actors in the modern era.⁷⁸ This rich stakeholder language typically includes consideration of economic growth, environmental protection, and social equity in business planning and decision-making. In essence, it ranges from attempts to ‘gain or to extend legitimacy, to maintain its level of current legitimacy, or to repair or to defend its lost or threatened legitimacy.’⁷⁹ Implicit in these assurances is a normative claim that companies, due to their hegemony as global institutions, have a role to play in protecting the natural world. Accordingly, companies that produce voluntary unilateral assurance about the governance of environmental risk exhibit a commitment to issues and concerns beyond the basic tenets of profit making. It has been remarked that these environmental citizenship initiatives appear in some cases to even surpass overtures directed at shareholders and profit maximisation.⁸⁰ The apparent ubiquity of these

⁷⁷ Fairfax, above n 12 at 675; Itziar Castelló and Josep Lozano, ‘Searching for New Forms of Legitimacy Through Corporate Responsibility Rhetoric’ (2011) 11 J Bus Ethics 11.

⁷⁸ See e.g. Editorial, ‘Backlash Against Business’ *The Economist* (15 April 1989) at 11; Gail Edmonson and Laura Cohn, ‘Europe’s Corporate Governance: Parma Splat’ *The Economist* (15 January 2004) at 60.

⁷⁹ Gary O’Donovan, ‘Environmental Disclosures in The Annual Report: Extending the Applicability and Predictive Power of Legitimacy Theory’ (2002) 15 *Accountability, Auditing & Accountability Journal* 344 at 349.

⁸⁰ Clive Crook, ‘The Good Company’ *The Economist* (20 January 2005) at 3. See also, Lisa Fairfax, ‘Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric’ (2007) 59 *Fla L Rev* 771 at 774.

initiatives is a product of two concepts deeply rooted in Anglo-American economic history.⁸¹ The first is a mistrust of corporate power, which is a result of recent governance failures but traces back to the earliest forms of corporate structure. Even then, companies were restricted to very few freedoms, and operated in the face of governmental antipathy.⁸² The second concept is rooted in the widespread belief that self-regulation within an industry is preferable to and more effective than legalistic strategies of corporate regulation.⁸³ Any given company thus uses environmental dialogue to set out explicit or implicit social and ethical values and intentions in its conduct.

In spite of the ubiquity of these lofty environmental ideals across the modern corporate landscape, there has been minimal effort to empirically examine whether, and to what extent, these voluntary unilateral assurances accurately reflect a company's genuine efforts toward environmental sustainability.⁸⁴ This is attributable to several factors, not least because of the significant scepticism that dismisses such initiatives as inconsequential speech or a device for humanising large, public companies.⁸⁵ This widespread view is based on the notion that companies, or rather companies' public relations apparatus, use intellectually fashionable, non-binding commitments to project a favourable public image and influence the long-term expectations of society, but without an intention for these environmental statements or

⁸¹ Harvy Pitt and Karl Groskaufmanis, 'Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct' (1990) 78 Geo L J 1559 at 1574.

⁸² William Holdsworth, 'English Corporation Law in the 16th and 17th Centuries' (1922) 31(4) Yale LJ 382 at 382 et seq.

⁸³ See e.g. OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (OECD 14 October 2002).

⁸⁴ William Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43 J Bus Ethics 253 at 257.

⁸⁵ Millon, above n 13 at 533-535.

actions to reflect or shape actual corporate behaviour.⁸⁶ A related point is that while these voluntary unilateral assurances address in specific or detailed terms the issue of administration, rarely is accountability mentioned in a similarly exhaustive manner. This is currently a significant obstacle to enforcement. In the rare situations in which a company's behaviour might be open to legal challenge, there is a suggestion that the judiciary are reluctant to use the common law to resolve environmental controversies.⁸⁷ This translates into an absence of UK jurisprudence on the legal efficacy of these statements or actions, and even in the paucity of US authorities that have considered internal corporate ethics codes, the court has not fully articulated distinct legal principles or standards of behaviour.⁸⁸ While many open issues and questions remain about the legal status of a company's voluntary unilateral assurances about sustainable environmental performance, the next section will provide a practical first step in facilitating an enforceable legal right, in certain situations, to be conferred on the natural world, which will ensure that companies are more accountable for the environmental statements or actions being made. In particular, it can be argued that the doctrine of estoppel is capable of being displaced from the realm of contract or equity and pressed into service in an emblematic, divisive area of commercial activity that is an important site for the decisions, practices, and outcomes of companies.

E. AN ESTOPPEL BASED ENVIRONMENTAL ACTION

⁸⁶ Fairfax, above n 80 at 786-787. See also, Subhabrata Banerjee 'Corporate social responsibility: the good, the bad and the ugly' (2008) 34 Critical Sociology 51 at 52-59.

⁸⁷ This point is emphasised in *Cambridge Water Co v Eastern Counties Plc* (1994) 2 AC 264 (HL), 305, per Lord Goff. Cf. Lord Justice Carnwath, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16(3) JEL 315.

⁸⁸ Haley Revak, 'Corporate Codes of Conduct: Binding Contract or Ideal Publicity?' (2012) 63 Hastings L J 1645 at 1646-1647. Yet on occasion the courts have used corporate codes to infer how a company's conduct should be perceived and how a company should be deemed to have held itself out to the public. See e.g. *Elkind v Liggett & Meyers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980).

Before we discuss the proposed remedy it is important to say a few words about the question of whether, and to what extent, the environment *itself* is capable of being considered as a legal rights-holder. Much ink has of course been spilled on this philosophical and practical issue. This is ostensibly because granting certain legal entitlements to the environment necessarily endows it with legal personhood. There is considerable support at first sight for the natural world to be regarded as a putative legal “thing”, which has intrinsic ethical or moral claims to legal rights.⁸⁹ Yet the notion that the environment can have a legal, financial, or participatory role in the affairs of the company presents real-world difficulties.⁹⁰ At the very least this is because the natural world is a site of multi-faceted elements, processes, and ecosystems, which, in their own right, are not straightforwardly translated into legal institutional design.⁹¹ Another impediment is that as a natural object the environment is incapable of having constitutional standing.⁹² Nonetheless, the paradigm debate above is premised upon a simplistic “post hoc fallacy”, which depicts legal personhood as an expression of some uniquely defining attribute of human nature. This reasoning lacks or elides the obvious point that that the legal person is not necessarily a natural person,⁹³ and it suffers from intellectual myopia in being unable to see that such conceptions are already part of the law.⁹⁴ This prompts two closely

⁸⁹ The starting point is usually Christopher Stone, ‘Should Trees Have Standing? – Toward Legal Rights For Natural Objects’ (1972) 45 S Cal L Rev 450.

⁹⁰ See generally, Eric Orts and Alan Strudler, ‘The Ethical and Environmental Limits of Stakeholder Theory’ (2002) 12(2) Bus Ethics Q 215.

⁹¹ On this point, see e.g. Carrie Bradshaw, ‘The environmental business case and unenlightened shareholder value’ (2013) 33(1) LS 141 at 149 (and accompanying footnotes).

⁹² This is a much-contested issue. See e.g. Francisco Benzoni, ‘Environmental Standing: Who Determines the Value of Other Life?’ (2008) 18 Duke Env’tl L & Pol’y F 347; David Cassuto, ‘The Law of Words: Standing, Environment, and Other Contested Terms’ (2004) 28 Harv Env’tl L Rev 79; Jeffrey Miller and James Hopkins, ‘The Standing of Citizens to Enforce against Violations of Environmental Statutes in the United States’ (2000) 12(3) JEL 370; Chris Hilson, ‘*Laidlaw*: Some Observations from the UK/EU’ *ibid* at 381.

⁹³ William Lucy, ‘Law’s Persons’ in *Law’s Judgement*, currently unpublished manuscript on file with the author.

⁹⁴ *Ibid*. See also, Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart 2009) at 43.

related observations.⁹⁵ The first is the doctrinal understanding that natural things have at some points, in some legal systems, been accorded legal status and, second, the normative claim that certain natural things in addition to humans should have legal standing. These observations buttress our argument that the category of legal person can and should be extended to include the natural environment, which more plausibly connects it to legal rights-holding.

As a functional compromise, it is likely that political or deliberative engagement by private environmental claimants might constitute a precondition for the enjoyment of these rights, but it is recognised that the ‘multiple, overlapping and often uncertain causes’⁹⁶ of environmental problems are such that this claim cannot be made emphatically.⁹⁷ Nevertheless, it is contended that just as legal guardians can represent the diverse and complex interests of human beings unable to represent themselves so, too, could ‘ecological citizens’⁹⁸ represent on a case-by-case basis the diverse “interests” of the natural world in the face of actual or threatened environmental damage.⁹⁹ Furthermore, existing regulatory responses to environmental problems rely upon comparable deliberative choices, which often need to be made on an individual basis and involve the exercise of considerable discretion by administrators.¹⁰⁰ It is not unreasonable to suggest that environmental organisations, corporate watchdogs, local communities, and even governments, are capable of performing a similar function of information collection and organisation, receiving input from experts, communicating

⁹⁵ These points follow Lucy, above n 93.

⁹⁶ Eloise Scotford and Rachael Walsh, ‘The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context’ (2013) 76(6) MLR 1010 at 1014. See also, John Dryzek, *The Politics of the Earth* (OUP 2nd edn. 2005) at 8-9.

⁹⁷ For an overview of the philosophical, legal, and practice issues, including persuasive philosophical and judicial support for our approach, see above n 92.

⁹⁸ Andrew Dobson, *Citizenship and the Environment* (OUP 2003).

⁹⁹ Lucy, above n 93. See also, Naffine, above n 94.

¹⁰⁰ See Scotford and Walsh, above n 96 at 1014 (and accompanying footnotes).

with all parties involved in decision-making processes, and ongoing oversight of the legal complaint. Beyond this, because constitutional standing is essentially derivative of the rights of the natural environment, it would require private environmental claimants to eschew human self-interested and economic preferences and, instead, point to “environmental” injury.¹⁰¹ The court could consider a claim, it is argued, provided that the request for action establishes in a plausible manner that environmental damage exists and is capable of remedial action. This approach would necessarily produce the consequence that the environment itself would be the direct recipient of any outcome remedy from the court, although this does not preclude indirect benefits to peoples or communities affected by the environmental controversy.

Turning to the substance of the remedy, one of the most vibrant doctrines in recent years under UK law¹⁰² has been the equitable principle of estoppel.¹⁰³ Amongst the dense milieu of disorderly origins and inconsistent rules,¹⁰⁴ there are several varieties of estoppel in English law,¹⁰⁵ and a debate exists as to whether most, if not all, are species of the same genus, or should be regarded as so different in principle as to be

¹⁰¹ There is compelling evidence from social psychology, behavioural economics, and evolutionary biology that people ordinarily behave in objectively ethical and moral ways. See e.g. Lynn Stout, *Cultivating Conscience: How Good Laws Make Good People* (PUP 2010) esp. at Part 1.

¹⁰² Mark Thompson, ‘From Representation to Expectation: Estoppel as a Cause of Action’ (1983) 42(2) CLJ, 257 at 257. See also, Martin Dixon, ‘Confining and defining proprietary estoppel: the role of unconscionability’ (2010) 30(3) LS 408 at 10.

¹⁰³ See *Montefiori v Montefiori* (1762) 1 Black W. 363; 96 ER 203. Although the doctrine of estoppel is essentially an equitable doctrine, it was consciously incorporated into the common law by Lord Mansfield, who frequently entered the realm of equitable considerations of justice.

¹⁰⁴ Piers Feltham, Daniel Hochberg, Tom Leech, & George Spencer Bower, *Spencer Bower on The Law Relating to Estoppel by Representation* (Bloomsbury 4th edn. 2004) at 23-26; Bruce MacDougall, ‘Consideration and Estoppel: Problem and Panacea’ (1992) 15 Dalhousie L J 265 at 271.

¹⁰⁵ On its two principal conceptualisations – promissory and proprietary – see e.g. Michael Barnes, ‘Estoppels as Swords’ [2011] LMCLQ 372 at 372-373; Paul Baker, ‘The Future of Equity’ (1971) 93 LQR 529, esp. 538-539.

wholly independent.¹⁰⁶ The minutiae of that question are outside the scope of this inquiry, but we can identify in broad terms a common basis underlying the varieties of estoppel, which is explained by the very *raison d'être* of the doctrine. It is, in essence, a judicial remedy that stems from the basic moral idea for achieving consistency;¹⁰⁷ historical precedent clearly establishes that when a party to a legal controversy whose words or conduct have induced another to believe in a particular state of affairs, he or she may be precluded from attempting to act inconsistently with the assumptions thereby engendered when it would be unfair or unconscionable to do so.¹⁰⁸ The rights of the parties are then determined by reference to the assumed state of affairs. Therefore, estoppel precludes a party from asserting something contrary to what was implied by their previous statements or actions. In its classical form, the remedy is a powerful one and may often be dispositive of the substantive outcome of the dispute. Although estoppel does rest on certain basic factual elements in any given case, as a discretionary equitable remedy it is by its nature an astonishingly versatile device, not subject to overly restrictive rules that would diminish its effectiveness. Indeed, few doctrines are so 'potentially fruitful',¹⁰⁹ and while estoppel is 'more often cited than applied, and more often applied than understood',¹¹⁰ it is the

¹⁰⁶ For support of a general unified estoppel, see *Waltons Stores (Interstate) Ltd. v Maher* (1988) 62 A.L.J.R. 110 at 123; *Commonwealth of Australia v Verwayen* (1990) 65 A.L.J.R. 540 at 546; *Gillies v Keogh* [1989] 2 N.Z.L.R. 327 at 331; *Crabb v Arun DC* [1976] Ch. 179 at 193, as per Scarman LJ; *Amalgamated Investment and Property Co. Ltd. (In Liquidation) v Texas Commerce International Bank* [1982] Q.B. 84 at 103, 122, as per Lord Denning; *Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133 at 153, as per Oliver J. See also, Margaret Halliwell, 'Estoppel: unconscionability as a cause of action' 1994) 14 LS 15; Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (OUP 2002) at 40; Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) at 61-62.

¹⁰⁷ *R (Reprotech (Pebsham) Ltd.) v East Sussex County Council* [2003] 1 WLR 348, [35], as per Lord Hoffman.

¹⁰⁸ Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] CLJ 537 at 547-548.

¹⁰⁹ Geoffrey Cheshire & Cecil Fifoot, 'Central London Property Trust Ltd. v High Trees House Ltd.' (1947) 68 LQR, 283 at 286. See also, David Thompson, 'Equitable Estoppel of the Government' (1979) 79 Colum L Rev 551 at 558; Cooke, above n 106 at 171.

¹¹⁰ Cheshire & Fifoot, *ibid.*

coherent medium through which non-contractual expectations are fulfilled, either wholly or in part.¹¹¹

When evaluating whether a company's voluntary unilateral assurances about environmental goals and responsibilities constitute a suitable basis for an estoppel, three practical elements would need to be established: that an assurance or representation was made; whether this can be reasonably taken to induce reliance (usually in the form of an expectation); and that it would be unfair or unconscionable if the company acted inconsistently with its assurance.¹¹² These requirements in respect to a company and the natural world are considered in more detail below, but while they are discussed separately for ease of analysis, it is important to understand that each of the requirements may, to some extent, influence the other.¹¹³ The first condition for estoppel is that an assurance or declaration must have been made. At a very general level it can be said that, since an assurance is a positive declaration intended to generate an expectation about a particular state of affairs, it must involve effective communication. The courts have been prepared to recognise a wide range of communication methods to assess whether or not an assurance has been made. This includes the use of words, behaviour, or silence; grammatically it must take the form of a sufficiently clear and unambiguous assertion¹¹⁴ about past, present, or future situations. This can relate to any subject matter, *whether constituting objective fact or intention*, and which can be reasonably taken to produce confidence in the

¹¹¹ Thompson, above n 102 at 275; Elizabeth Cooke, 'Estoppel and the Protection of Expectations' (1997) 17(2) LS 258; Feltham, Hochberg, Leech, & Spencer Bower, above n 104 at 21.

¹¹² Edwin Peel, *Treitel's The Law of Contract* (Sweet and Maxwell 13th edn. 2011) at 146 et seq.

¹¹³ *Gillett v Holt* [2001] Ch. 210 at 228.

¹¹⁴ The words of Lord Halisham are usually regarded as the modern authority on the issue of ambiguity in *Woodhouse AC Israel Cocoa Ltd. S.A. v Nigerian Produce Marketing Co. Ltd.* [1972] AC 741, HL.

declaration.¹¹⁵ While there has been much academic and practitioner fervour preoccupied with the conventional distinctions between types of assurance, a persuasive strand of recent thinking suggests that we should abandon the notion that estoppel is dependent upon a particular form of assurance, and focus on the fact that an expectation interest has arisen.¹¹⁶ This means the focus of the law is not necessarily upon the *form* of voluntary unilateral assurance by a company, but instead centres on the *effect* of words, or conduct, upon the commons and the public interest.

This prompts the question of whether a company's voluntary unilateral assurances can in fact constitute an effective representation that is capable of being reasonably understood in a particular sense and under normal circumstances induces an expectation that a certain state of affairs exists. It is trite that assurances in estoppel and contractual offers must in general satisfy the requirement of certainty. Yet it is also true that under estoppel the court is exercising an equitable jurisdiction and thus is not restricted to the same rigid conditions of form.¹¹⁷ The classic test of an effective assurance in estoppel is that it must be 'clear enough',¹¹⁸ to produce an expectation that can be ascertained and described. In other words a company's environmental citizenship dialogue would not to be held to something that might be interpreted perversely or speculatively.¹¹⁹ While a mixture of different interpretations might exist, it will not preclude an expectation from arising, provided that one of these meanings

¹¹⁵ *Gillett v Holt*, above n 113 at 228; *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 at [78].

¹¹⁶ Thompson, above n 102; Adam Ship, 'The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis' (2008) 46(1) *Alberta L Rev* 77.

¹¹⁷ Pauline Ridge, 'The Equitable Doctrines of Part Performance and Proprietary Estoppel' (1988) 16 *MULR* 725 at 727.

¹¹⁸ *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 at [56], per Lord Walker, and Lord Rodger at [26], Lord Neuberger at [84]. See also *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, as per Lord Scott at [25].

¹¹⁹ Cooke, above n 106 at 75-76.

can be reasonably taken to have induced the belief.¹²⁰ The burden would then be on a company, in order to escape liability, to establish that the expectation in question would have arisen regardless of the company's voluntary unilateral assurances about environmental sustainability.¹²¹

To throw light on this point, let us take the example of two companies listed on the London Stock Exchange, which have produced archetypal statements about various environmental goals and responsibilities. The multinational mining company, Anglo-American plc, is the first example of a business that produces fulsome environmental communications. Its website asserts that the company is 'recycling and purifying the water [it uses] and bringing it to communities where it's scarce' before going on to proclaim that it is 'helping preserve access rights and water quality of communities wherever [the company] operates.'¹²² In addition to an annual report,¹²³ the company produces a Sustainable Development report.¹²⁴ This document declares that it 'work[s] with host communities to help... protect scarce resources like land and water'¹²⁵ and to achieve this objective it 'employ[s] the "avoid, minimise, mitigate" hierarchy of controls to decrease... water consumption, reduce the potential impact [the business has] on water quality and eliminate water-related environmental

¹²⁰ The assurance or promise does not need to be the *sole* inducement for a particular expectation to exist. See e.g. *Matharu v Matharu* (1994) 68 P. & C.R. 93.

¹²¹ *Greasley v Cooke* [1980] 1 W.L.R. 1306.

¹²² Anglo American plc has a specific section related to sustainability and the environment on its website (<http://www.angloamerican.com/sustainability/environment>) [accessed 1 February 2016].

¹²³ The Anglo American Annual Report 2013 contains substantial financial information, but also traverses governance and responsibilities for public and ethical issues (<http://www.angloamerican.com/~media/Files/A/Anglo-American-PLC-V2/investors/reports/annual-report2013.pdf>) [accessed 1 February 2016].

¹²⁴ Anglo American Sustainable Development report (<http://www.angloamerican.com/~media/Files/A/Anglo-American-PLC-V2/investors/reports/aa-sdr-2803.pdf>) [accessed 1 February 2016].

¹²⁵ *Ibid* at 9.

incidents.’¹²⁶ The UK telecommunications multinational, Vodafone plc, provides a second typical example of these voluntary unilateral assurances, which are set out in a sustainability section on its website¹²⁷ and a Sustainability report.¹²⁸ The report states the company ‘minimalise[s] the environmental footprint of [its] operations to [facilitate] less energy, less carbon, less waste and less use of resources.’¹²⁹ It goes on to commit to ‘recycle the majority of [the business’s] network waste’ and in the challenging conditions of emerging markets with limited facilities to recycle and manage electronic waste Vodafone insists that it works actively ‘to ensure network waste is disposed of responsibly’.¹³⁰ Overall, when a company has produced statements or actions similar to the examples above, it is submitted that it could satisfy the requirement of being sufficiently clear and straightforward dialogue. In a number of situations, this in turn could reasonably produce or reinforce a non-contractual expectation about a particular state of affairs, such as a belief that the company has made a commitment to preserving water quality or proper handling, recycling, and disposing of waste.

The second condition for estoppel is that a company’s voluntary unilateral assurance needs to be the kind of material communication that can be reasonably taken to have induced reliance on a particular expectation about the company’s governance of

¹²⁶ Ibid at 58.

¹²⁷ Sustainability section on the Vodafone plc website (http://www.vodafone.com/content/index/about/sustainability/our_vision.html) [accessed 1 February 2016].

¹²⁸ Vodafone Sustainability Report 2013/14 (http://www.vodafone.com/content/dam/sustainability/2014/pdf/vodafone_full_report_2014.pdf) [accessed 1 February 2016].

¹²⁹ Ibid at 97.

¹³⁰ Ibid at 98.

environmental risk.¹³¹ It will be recalled, meanwhile, that a frequent criticism of corporate environmental citizenship is the perception that a company might intend only for its statements or actions to be mere “green-washing” or “window-dressing”.¹³² The intention of a company is brought into sharp focus, and the jurisprudence suggests this is to be objectively assessed. To give an example, Coca-Cola HBC plc purports to ‘[minimise its] environmental impact [as] a core target’,¹³³ honouring a ‘commitment to reduce, recycle and replenish water [it uses]’,¹³⁴ and ‘improving [its] energy efficiency, switching to cleaner energy sources and developing low-carbon technologies.’¹³⁵ However, Coca-Cola HBC might not in fact *intend* for this declaration to reflect corporate practice, which threatens the material quality of the assurance and thus the likelihood that it can reasonably be taken to have induced reliance. Nonetheless, there is considerable judicial support for marginalising issues relating to the probity of an assurance, provided it is clear from other factors that it can be reasonably taken to have induced reliance on a particular expectation, and to permit the company to act inconsistently with this assumed state of affairs would be unconscionable.¹³⁶ When we consider the environmental commitments of Anglo-American, Vodafone, and Coca-Cola HBC, it is submitted that the statements can be reasonably taken to induce reliance on a particular expectation about how these companies will operate. To support this assertion, there is empirical evidence that demonstrates how companies acknowledge the social or public expectation for multinationals to operate responsibly in domestic and

¹³¹ *First National Bank plc. v Thompson* [1996] Ch. 231, CA, per Millet LJ at 236. On the point that materiality is used as a tool to assist in the proof of reliance, see e.g. *Smith v Chadwick* (1882) 20 Ch. D. 27, at 44.

¹³² See the text accompanying notes 84-87 above.

¹³³ Coca Cola HBC plc website (http://www.coca_colahellenic.com/sustainability/environment) [accessed 1 February 2016].

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ See e.g. *Museprime Properties Ltd. v Adhill Properties Ltd.* [1990] 2 EGLR 196.

international environmental matters.¹³⁷ Moreover, these studies show that expectations were created, to a large extent, because of corporate policy statements and published internal practices about the governance of externalised risk.¹³⁸

The final element of a successful estoppel is the question of whether, and to what extent, it is unconscionable or unfair to act inconsistently with previous statements or actions. Having evolved from a rigid nineteenth century formulation,¹³⁹ the overall modern tendency of a wholly liberalised and equitable estoppel¹⁴⁰ is the ability to defeat a broad category of unconscionable conduct by the ‘making good of a representation, where to do otherwise, would produce an inequitable result.’¹⁴¹ Few could doubt that the English courts have made very clear in all cases of estoppel the notion that unconscionability is central to the doctrine.¹⁴² This relates to the intrinsic jurisdiction to restrain injustice. But the broad framing of unconscionability means that precise explanations of its centrality within the overall doctrine of estoppel, and thus its role within successful estoppels, is almost always hidden or half-articulated in the various judgments, particularly when compared to the treatment given to the more factual elements of assurance or expectation.¹⁴³ However, there are two closely related principles relating to unconscionability, which provide an evaluative framework for assessing the court’s multi-faceted inquiry. The first point is a simple one and depicts unconscionability as the going back on an assurance about formality;

¹³⁷ Anita Jose and Shang-Mei Lee, ‘Environmental Reporting of Global Corporations: A Content Analysis Based on Website Disclosures’ (2007) 72(4) J Bus Ethics 307; Dennis Rondinelli and Michael Berry, ‘Environmental Citizenship in Multinational Corporations: Social Responsibility and Sustainable Development’ (2000) 18(1) European Management Journal 70.

¹³⁸ Jose and Lee, *ibid* at 308; Rondinelli and Berry, *ibid* at 75.

¹³⁹ *Willmott v Barber* (1880) 15 Ch D 96, 105.

¹⁴⁰ The most famous liberalisation of the concept of equitable estoppel is that of Oliver J in *Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* above n 106.

¹⁴¹ Halliwell, above n 106 at 20.

¹⁴² *Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* above n 106 at 151, as per Oliver J; *Gillett v Holt*, above n 113 at 225, as per Walker LJ. See also, Cooke, above n 106 at 84-85.

¹⁴³ Dixon, above n 102 at 412. See also, Cooke, above n 106 at 85-85 (and accompanying footnotes).

this in turn justifies the discarding of formality rules that would otherwise apply.¹⁴⁴ This is likely to be established if a company's voluntary unilateral assurance amounts to: (i) a 'sufficiently precise'¹⁴⁵ declaration about the company's environmental goals and responsibilities, and; (ii) it can be reasonably taken to have produced an expectation that the company intends to act consistently with its commitments. In essence, a company's statements or actions to behave in a certain way in respect to environmental performance constitutes a non-contractual obligation, but to act inconsistently with this declaration partially leads to a presumption of unconscionability or unfairness.

The second part of the court's evaluative judgment about the existence of unconscionability is more complex, and relates to the issue of whether the assurance can reasonably be taken to have induced reliance or prompted a change of position.¹⁴⁶ As discussed above, a much-debated legal issue is whether, and to what extent, the natural world can be regarded as a putative legal "thing", which is capable of having constitutional legal standing.¹⁴⁷ This article submitted that the category of legal person could and should be extended to include the natural environment, which more plausibly connects it to legal rights-holding. However, it does not follow that the environment can change position on the basis of a company's statements or actions about sustainable environmental behaviour. The functional solution offered submits that ecologically motivated citizens could represent the diverse "interests" of the natural world, and this is already the case in a number of instances. Because this

¹⁴⁴ Dixon, *ibid* at 417-419.

¹⁴⁵ *Woodhouse AC Israel Cocoa Ltd. S.A. v Nigerian Produce Marketing Co. Ltd.* [1972] AC 741 (HL), as per Lord Hailsham; *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776, per Lord Walker at [56], Lord Rodger at [26], and Lord Neuberger at [84].

¹⁴⁶ See e.g. *Heane v Rogers* (1829) 9 B. & C. 577 at 586 at 586; *Pickard v Sears* (1837) 6 Ad & El 469 at 474.

¹⁴⁷ See the text accompanying notes 89-101 above.

constitutional standing would be essentially derivative of the rights of the natural environments, it requires ecological citizens to eschew human self-interested and economic preferences and, instead, point to “environmental” injury. The estoppel jurisprudence suggests that there is no quantitative measure for the appropriate level or type of reliance; it often invokes expenditure of resources, *or something immediately identified as a loss or unpleasant, but it is frequently much more nuanced than that*. Accordingly, local communities, such as people indigenous to the highland Chiapas region of Mesoamerica could point to the diminished purity of essential groundwater and springs in the area because of a reliance on the faith of corporate published policy statements pledging to reduce, recycle and replenish natural water supplies used in the process of its localised activities.¹⁴⁸ It is equally conceivable that a conservation and sustainability NGO acting on behalf of the Riau Province, Sumatra, might identify net loss of the natural forest over a certain period of time,¹⁴⁹ despite placing trust in the statements or actions about sustainable environmental use of Southeast Asian pulp and paper companies that are the main driving force behind that deforestation.¹⁵⁰ The upshot is that, in many cases of reliance, the position

¹⁴⁸ This hypothetical example is based upon a case study in June Nash, ‘Consuming interests: water, rum, and Coca-Cola from ritual propitiation to corporate expropriation in highland Chiapas’ (2007) 22(4) Cultural Anthropology 621.

¹⁴⁹ This is frequently linked to diminishing biodiversity of the forests, their function as habitat for key endangered species, the environmental services they provide for downstream cities and villages and economic importance for local communities.

¹⁵⁰ This example is based on the campaigns of Greenpeace and World Wildlife Fund to prevent deforestation in the Riau Province, Sumatra, by Indonesian pulp and paper company, Asia Pacific Resources International Holdings Ltd (APRIL). Although this is a non-UK listed company, it is used as an example to make a certain point within the context of the overall argument. See e.g. Greenpeace International press release, ‘APRIL’S Unhappy Anniversary’ (Greenpeace International, 2 February 2015) available at: <<http://www.greenpeace.org/international/en/news/Blogs/makingwaves/april-deforestation/blog/52020/>> [accessed 1 April 2015]; and WWF Indonesia, ‘WWF Monitoring Brief: Asia Pacific Resources International Holdings (APRIL)’ (World Wildlife Fund, June 2006) available at: <http://assets.wwfid.panda.org/downloads/wwf_mon_brief_june_2006_april.pdf> [accessed 1 April 2015]. For an overview of APRIL’S corporate environmental dialogue, see the Sustainability section and accompanying reports and policies on its corporate website: <<http://www.aprilasia.com/en/sustainability>> [accessed 1 April 2015].

alteration of the ecologically motivated citizens, based on a company's assurances, often might be construed as forming the second aspect of unconscionability.

Where all the elements necessary to give rise to an equitable estoppel have been established, the effect of an estoppel is said to be to confer an "equity" to remedy the legal controversy. This raises two additional questions: namely, what is the extent of the "equity", and what are the remedies for non-performance of voluntary unilateral assurance about the governance of environmental risk.¹⁵¹ In practice these questions tend to be conflated; but they will be addressed separately for ease of exposition. The first inquiry is a straightforward one that can be answered summarily. When a statement or action gives rise to an estoppel, the parties must be dealt with on the footing that the assurance is true. But this pretence does not make it true, and it may be necessary for the company to do something further in order to bring that about. It is trite that the effect of estoppel, in many of the cases, is to give rise to a binding obligation when no such obligation exists within formal areas of law.¹⁵² The court's jurisdiction in this area is equitable and therefore flexible. In legal terms discretionary remedialism does not seek to replace pre-existing formal law; instead it operates, in certain circumstances, 'to do what is equitable in all the circumstances'.¹⁵³ Therefore, an estoppel would operate in the context herein argued for to mitigate the harshness of, or act as an alternative to, traditional contractual legal doctrine. In a very real sense, the doctrine of estoppel can operate to oblige a company, either prospectively or retrospectively, to act consistently with its statements or actions about environmental sustainability. The point is that estoppel in

¹⁵¹ *Crabb v Arun* above n 106 at 193, as per Scarman LJ.

¹⁵² See e.g. *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 Ind App 203; *Ramsden v Dyson* (1866) LR 1 HL 129.

¹⁵³ *Roebuck v Mungovin* [1994] 2 A.C. 224 at 235.

this context, as illustrated by the words of Lord Evershed, has the ‘somewhat qualified and negative characteristic; it [is] not so much to *do* justice, as to *restrain* injustice, i.e. to stop the unconscionable conduct of the [company] against whom equity [proceeds].’¹⁵⁴

Turning to the second question, although the court has considerable discretion in respect to the appropriate remedy in cases of estoppel, that discretion is not a ‘completely unfettered’¹⁵⁵ one and a ‘principled approach’¹⁵⁶ is exercised. In giving effect to the “equity” it is traditionally thought that there must be proportionality between the expectation and the detriment.¹⁵⁷ For the purposes of achieving such proportionality regard must be given to the precision of the assurance, which can then help to ascribe the measure of expectation and reliance to the defendant.¹⁵⁸ It should be noted, however, that there is no requirement that expectation or reliance take a particular form, and the current position is that it need not consist of quantifiable economic loss, which means that non-economic detriment to the environment will suffice.¹⁵⁹ If we imagine specific and less specific assurances at opposite ends of a spectrum, when the assurance is indeterminate or provided with qualifications, then it will be more difficult to ascribe a proportionate degree of expectation and reliance to the defendant, which will of course limit the extent of relief granted.¹⁶⁰ On the contrary, when an assurance amounts to a more certain statement about environmental responsibility then there is a higher likelihood of ascribing expectation and reliance to

¹⁵⁴ Raymond Evershed, ‘Reflections on Fusion of Law and Equity after 75 Years’ (1954) 70 LQR 326 at 329.

¹⁵⁵ *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 E.L.R. 501 at 43.

¹⁵⁶ *Ibid.*

¹⁵⁷ See e.g. Hugh Beale (ed), *Chitty on Contracts* (Sweet and Maxwell 31st edn. 2014) at 420-421.

¹⁵⁸ *Ibid.*

¹⁵⁹ Simon Gardner, ‘The Remedial Discretion of Proprietary Estoppel – Again’ (2006) 122 LQR 492 at 498.

¹⁶⁰ Beale, above n 157 at 421, citing as authority *Jennings v Rice* at [50].

the encouragement, or acquiescence, that the assurance must have provided. The proportionate remedies available in corporate environmental cases would normally be an injunction to prevent or control any future unreasonable conduct, and orders of specific performance to correct past unreasonable harm to the environment.¹⁶¹ Where it cannot operate retroactively to make good past environmental defects, punitive or exemplary damages could be awarded directly to the environment to compensate for past unreasonable loss, which would also have the indirect advantage of deterring the delinquent company and others from engaging in such conduct that formed the basis of the litigation.¹⁶²

Drawing together this discussion on the valid application of estoppel to companies' environmental statements or actions, it is significant and worth emphasising that the use of estoppel envisaged here does not facilitate the creation of a rule of law, and will not create new rights in all cases of environmental controversy. For example, there are a slim number of companies that currently do not produce environmental citizenship dialogue. Others issue highly abstract statements or actions, or offer assurances with significant qualifications, which might not be reasonably taken to induce reliance on them. For the majority of companies that *do* produce more distinct voluntary unilateral assurances about environmentally responsible behaviour, the constituent elements of the doctrine of estoppel would need to be established in order

¹⁶¹ Due to various legal and practical impediments, it is recognised that there are restrictions in the scope of retroactive liability. For a brief consideration of this issue specifically in respect to land contamination, see e.g. Fisher, et al, above n 11 at 979. There is also ample literature on the draft Directive on Environmental Liability's ill-fated attempts to introduce retroactive liability in certain areas of environmental protection. However, there has been encouraging domestic support for this approach at the policy-making level and in the extant law itself. See e.g. Department of the Environment, *Paying for our Past: Arrangements for Controlling Contaminated Land and Meeting the Costs of Remedying the Damage to the Environment: A Consultation Paper* (DoE, London, March 1994); and Part 2A of the Environmental Protection Act 1990.

¹⁶² This could be held in trust for the affected areas of the environment and administered, for instance, by the Environment Agency or local government.

to provide a suitable basis for a claim to succeed. When these conditions exist, the doctrine of estoppel, as a form of discretionary remedialism, permits the courts to award *the appropriate remedy in the circumstances of each individual case*.¹⁶³ It will be remembered that corporate environmental dialogue is becoming increasingly ubiquitous, and formulated in order to bring about significant outcome-benefits (to the extent of being crucial to a company's social or public "licence" to operate, even in the face of increased exposure to liability as is considered in this article) from society generally.¹⁶⁴ In a world that is increasingly and ever more closely integrated, such corporate statements or actions are highly visible and thus can be said to target, and come to the attention of, almost all areas of the globe where the company operates.¹⁶⁵ In this regard, the application of a valid estoppel provides a practical first step in this specific challenge of addressing how companies might better conform to societal expectations based on the way they have held themselves out in respect of the governance of environmental risk.

A related final point is that while there are limits to the substantive and structural aspects of private law,¹⁶⁶ in a number of instances this branch of law is understood to operate as a successful mode of environmental protection.¹⁶⁷ There are at least three

¹⁶³ On the merits of discretionary remedialism, see Simon Evans, 'Defending Discretionary Remedialism' (2001) 23 Sydney L R 463.

¹⁶⁴ See the text accompanying notes 77-83 above.

¹⁶⁵ In order for a representation to be relied upon it must have come to the notice of the party claiming estoppel. See e.g. *K. Lokumal & Sons (London) Ltd. v Lotte Shipping Co. Pte. Ltd.* [1985] 1 Lloyd's Rep. 28, CA. However, it is arguable that there is an "ambulatory" nature to corporate environmental dialogue, which means that often it will be communicated and repeated or passed on and intended to influence the actions of others. On this, see John Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* (Carswell 1900) at 385 et seq.

¹⁶⁶ There is substantial debate about the limitations of private law generally. For a brief synopsis in this context, see Fisher, et al, above n 11 esp. at 53-56

¹⁶⁷ Ibid at 234-251. See also, Scotford and Walsh, above n 96 at 1014.

important arguments in support of private law doctrine and private law litigation.¹⁶⁸

First, private rights can be used to protect a broader range of concerns than public regulatory measures. Second, there is a symbolic importance attached to private law actions, whereby mainstream law provides fundamental recognition of the apportionment of rights and remedies in relation to environmental protection. Finally, private law actions provide a way to agitate for legal change on behalf of individual litigants in a way that does not depend upon a legislature or administrative body deciding to protect something. With this in mind, the doctrine of estoppel is already used extensively in UK law¹⁶⁹ and, it is submitted, the internal flexibility¹⁷⁰ and underlying emphasis on restraining injustice¹⁷¹ is conceptually relevant to the governance of corporate environmental risk. If we look across the Atlantic, a useful point of reference is evident in a line of corporate law cases involving shareholders suing the directors. Implicit in these authorities is the very logic of estoppel, which provides a compelling case that a board might be prohibited from acting inconsistently with its previous assurances to shareholders if it would be unfair or unconscionable to do so.¹⁷² Of course, an application of estoppel to environmental controversies presents a purely practical misalignment with its pre-existing use, but that could be remedied with a creative judicial application of the law. Certainly, there is some acceptance amongst senior members of the judiciary that the courts ‘have a

¹⁶⁸ From the broader scope of private law to the issues of justice not dependent upon the organs of the State, these points follow Fisher, et al, *ibid* at 245.

¹⁶⁹ The doctrine has been involved with various commercially-oriented areas of law, such as with the law of contract and consideration; land law; another with trusts and other equitable doctrines; a further liaison has long existed with bailment and the law of agency; *nemo dat* conflicts; and a significant link can also be discovered with the tort of misrepresentation.

¹⁷⁰ Ewan McKendrick, *Contract Law: Texts, Cases and Materials* (OUP 6th edn. 2014) at 212.

¹⁷¹ Evershed, above n 154 at 329.

¹⁷² *NECA-IBEW Pension Fund v Cox (Cincinnati Bell Inc.)* No. 11-CV-451, 2011 WL 4383368 (S.D. Ohio Sept. 20, 2011); *United Funds, Inc. v Carter Prods., Inc.*, CCH Corp. L. Guide 11469, 32 U.S.L. Week 2146 (Md. Cir. Ct., May 16, 1963).

vital role to play in the protection of the environment.’¹⁷³ More broadly, the courts have been assessing the actions of directors and managers for many years and, as recognised elsewhere, they are now more adept at doing so than ever before.¹⁷⁴

F. CONCLUSION

This article has mapped the significant, complex legal interactions between the doctrinal and normative order of modern UK company law and the extant environmental liability regime, tracking the path of this relationship to a background state of legal normality against which economic concerns sit uneasily with public safeguards for the natural world. While no attempt has been made to speak to the more broad and complex problems of the ideologically staid climate in company law or to expand the mandate of environmental law, this article has demonstrated that the legal situation above has created a regulatory space. Against this philosophical and practical divide, the business community has generated its own self-regulatory governance initiative to address growing anxiety about the contribution of commercial actors toward environmental degradation and natural resource depletion. This at first sight represents an attractive ideal that purports to instantiate a mixture of environmental goals and responsibilities, particularly at board level, in a way that is not adequately provided for within existing aspects of law. Despite outward appearances, the article argues that such voluntary unilateral assurances about the governance of environmental risk lack binding legal force, and many open issues and questions remain about whether companies are answerable for their decisions, practices, and outcomes in this context. To address this specific problem, it has

¹⁷³ Lord Justice Carnwath, above n 87 at 327.

¹⁷⁴ Andrew Keay, ‘Formulating a Framework for Directors’ Duties to Creditors: An Entity Maximisation Approach’ (2005) 64(3) CLJ 614 at 643.

examined the case for the legal facilitation an enforceable right, in certain situations, to be conferred on the natural world, which will ensure that companies are more accountable for their environmental commitments *when no such obligation exists within formal areas of law*. It sought to demonstrate that this is possible through the common law doctrine of estoppel, which can be opened up to prevent a company from acting inconsistently with its previous statements or actions about the governance of environmental risk. It is hoped that the constitute elements and legal plausibility of this idea have been established, but of course the legal rules and nuances of implementing it in practice need to be more clearly defined in subsequent debate.